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No. 185

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In the Supreme Court of the United States

OCTOBER TERM, 1968

WILLIS ATTOCKNIE, PETITIONER

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. xxxi-xxxv) is reported at 390 F.2d 636. The opinion of the district court (Pet. App. xvi-xxix) is reported at 261 F.Supp. 876. The administrative decision, which became the Secretary of the Interior's final order (Pet. App. xii-xv), is not reported.

JURISDICTION

The judgment of the court of appeals was filed on March 14, 1968. The petition for a writ of certiorari

was filed on June 12, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of the Interior's approval of the will of an Indian as specifically authorized by statute may be overturned by the court.

STATUTE INVOLVED

The Act of June 25, 1910, 36 Stat. 855, as amended, 25 U.S.C. 373, provides:

> Sec. 2. Any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: *Provided, however,* That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: *Provided further,* That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator, and in case where a will has been approved and it is subsequently discovered that there has been fraud in connection with the execution or procurement of the will the Secretary of the Interior is authorized within one

year after the death of the testator to cancel the approval of the will, and the property of the testator shall thereupon descend or be distributed in accordance with the laws of the State wherein the property is located: * * *.

STATEMENT

Albert Attocknie, a Comanche Indian, died leaving a restricted estate consisting of certain alloted lands (Pet. App. xvii). Under a will dated August 1, 1961, approved by the Department of the Interior, Albert Attocknie devised and bequeathed his estate to his four legitimate children (Pet. App. xvii, xii). The will also contained the following provision: "I leave nothing to Willis Attocknie because he is not my son" (Pet. App. xii).

Petitioner claimed that the decedent did not have sufficient testamentary capacity to execute a will on August 1, 1961, because at that time he was suffering from an "insane delusion" that petitioner was not his son (Pet. App. vii). After hearing conflicting evidence, the Bureau of Indian Affairs' hearing examiner approved the will, finding that there had been no showing made that the decedent was incompetent (Pet. App. x). The examiner also found that the petitioner was the illegitimate son of the decedent (Pet. App. viii). In departmental proceedings, that decision was affirmed (Pet. App. xii-xv). Petitioner then commenced this action, requesting that the Secretary's decision be set aside and that the estate be distributed in accordance with the laws of descent and distribution of the State of Oklahoma (Pet. App.

xvii). The judgment of the district court, dismissing the complaint on the merits (Pet. App. xxx), was reversed by the court of appeals, with directions to dismiss for lack of jurisdiction on the ground that, under Section 2 of the 1910 Act, *supra*, the departmental decision was not subject to judicial re-examination (Pet. App. xxxiv-xxxv).

ARGUMENT

The decision below rests upon the unquestioned authority of the Secretary of the Interior to supervise the distribution of Indian estates pursuant to 25 U.S.C. 372-373. The critical holding is that the Secretary's approval of the Indian will involved here is not subject to be overturned by the courts. While the opinion below states the rule of non-reviewability in broad terms—correctly we believe—the application of the rule in this case presents no conflict with decisions of this Court or of the Court of Appeals for the District of Columbia.

Indeed, the Secretary's decision here turns on a determination of fact: that the testator was not suffering an "insane delusion" in believing that petitioner was not his son. No court has held that the judicial function—whatever its limits in other respects—includes authority to re-examine that kind of finding. Plainly, *Blanset* v. *Cardin*, 256 U.S. 319, which merely construed 25 U.S.C. 373 as overriding State law, is not in point. Nor is *Homovich* v. *Chapman*, 191 F.2d 761 (C.A.D.C.) to the contrary. While the Court of Appeals for the District of Columbia there ex-

pressed the view that the Secretary's actions under Section 373 are judicially reviewable in some circumstances (and is to that extent apparently in disagreement with the court below), the opinion expressly holds that when the Secretary's determination is "within the scope of the authority conferred upon him, the court cannot disturb his decision." *Id.* at 764. That rule, reiterated more recently in *Hayes* v. *Seaton*, 270 F.2d 319 (C.A.D.C.),[1] would effectively preclude review here.

We question whether the scope of the judicial authority in reviewing determinations of the Secretary of the Interior under 25 U.S.C. 373 is a matter that presses for authoritative decision by this Court. But, at all events, the decision below—correct by any standard—does not appear to be an appropriate vehicle for that purpose.

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[1] See, also, the *per curiam* order in *Asenap* v. *Huff*, 312 F.2d 358 (C.A.D.C.), directing the district court to enter summary judgment in favor of the Secretary.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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